

# Feminism, Democracy, and the “War on Women”

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## Introduction

In the aftermath of the 2012 presidential election, the time is right to reflect on the relationship between feminism and democracy. Leading up to the election, social conservatives launched a range of aggressive attacks on women’s rights. The Governor of Virginia announced his support for mandatory transvaginal ultrasounds for women seeking abortions.<sup>1</sup> Conservative radio host Rush Limbaugh called law student Sandra Fluke a “slut” and a “prostitute” for testifying before Congress in support of contraception coverage.<sup>2</sup> A United States congressman running for the Senate stated that women could not get pregnant from “legitimate rape.”<sup>3</sup> These were just a smattering of the volleys in the so-called War on Women; which became a central conflict of the 2012 campaign season.<sup>4</sup> Combat

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1. Dahlia Lithwick, *Virginia’s Proposed Ultrasound Law is an Abomination*, SLATE (Feb. 16, 2012, 6:57 PM), [http://www.slate.com/articles/double\\_x/doublex/2012/02/virginia\\_ultrasound\\_law\\_women\\_who\\_want\\_an\\_abortion\\_will\\_be\\_forcibly\\_penetrated\\_for\\_no\\_medical\\_reason.html](http://www.slate.com/articles/double_x/doublex/2012/02/virginia_ultrasound_law_women_who_want_an_abortion_will_be_forcibly_penetrated_for_no_medical_reason.html).

2. David Nakamura & Paul Kane, *President Calls Student Blasted by Rush Limbaugh*, WASH. POST, Mar. 3, 2012, at A1.

3. Amy Davidson, *What Does Todd Akin Think “Legitimate Rape” Is?*, THE NEW YORKER (Aug. 19, 2012), <http://www.newyorker.com/online/blogs/closerread/2012/08/what-does-todd-akin-think-legitimate-rape-is.html>.

4. While the “War on Women” expression was controversial, the media widely used the term as a descriptor of various gender-based ideological differences between the Democrats and Republicans in 2010 and 2012, and thus the term is used as similar shorthand in this article. On the waxing and waning of the term, see David Weigel, *The “War on Women” is Over*, SLATE, (Apr. 12, 2012, 6:37 PM), [http://www.slate.com/articles/news\\_and\\_politics/politics/2012/04/hilary\\_rosen\\_ann\\_romney\\_the\\_birth\\_adolescence\\_and\\_death\\_of\\_the\\_democrats\\_war\\_on\\_women\\_talking\\_point\\_2.html](http://www.slate.com/articles/news_and_politics/politics/2012/04/hilary_rosen_ann_romney_the_birth_adolescence_and_death_of_the_democrats_war_on_women_talking_point_2.html).

was waged on many fronts, including abortion restrictions, access to contraception, funding for Planned Parenthood, welfare programs, and workplace fairness. These battles fueled the twenty-point gender gap that propelled President Obama to a second term, as well as a record number of women into Congress. Notably, the combatants in this war were not only politicians, but also everyday Americans demanding a say in shaping public policies that impact women.

Feminism has long had a conflicted relationship with American democracy.<sup>5</sup> After all, if women are half of the population with equal access to the ballot box, then why do so many laws perpetuate or ignore gender oppression, and why do so few women hold electoral office?<sup>6</sup> Moreover, why has the feminist movement struggled internally to meet democratic ideals of participation and equality? While feminist theorists have pondered these questions for many years, the War on Women sharpened the urgency of sorting out the answers and provided new insights into the linkages between feminism and democracy. As the discussion below reveals, the War on Women reconfigured the relationship between feminism and democracy by reinvigorating the feminist political movement, redefining the scope of women's issues, realigning women voters across interest groups, and spurring a surge of women into office. Still, the relentless attacks of the War on Women kept the feminist movement on the defensive, and while many battles were won, the war continues without an apparent feminist offensive.<sup>7</sup>

This article reflects on the evolving relationship between feminism and democracy and the lessons learned during the recent election cycle. While democratic theory feeds feminist notions of equality, and vice versa, democracy in practice has had both liberating and oppressing effects for American women. Part I discusses the ways in which the feminist movement is informed by

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5. See Judith Squires, *Feminism and Democracy*, in THE BLACKWELL COMPANION TO POLITICAL SOCIOLOGY 366, 366 (Kate Nash & Alan Scott eds., 2004) ("The two traditions of democracy and feminism share many common preoccupations, but have had a complex, and at times fraught, association."); Anne Phillips, *Must Feminists Give Up on Liberal Democracy?*, 40 POL. STUD. (SPECIAL ISSUE) 68, 68 (1992) (stating that despite the right to vote, there is a "discouraging hint at deeper structures that keep women politically unequal").

6. See Tracy E. Higgins, *Democracy and Feminism*, 110 HARV. L. REV. 1657, 1683 (1997) ("[A]ccess to the ballot box is necessary but not sufficient to establish the legitimacy of democratic outcomes from a feminist standpoint . . .").

7. See Jessica Valenti, *Feminists for the Win*, THE NATION (Nov. 14, 2012), <http://www.thenation.com/article/171279/feminists-win> ("[W]e have a chance to move from a defensive crouch to an active agenda.").

democratic principles of democracy and how the movement used new political tools to fight the War on Women. Part II analyzes how the War on Women spurred broader notions of women's interests and women's roles as citizens. The categorization of women's issues not only expanded beyond the public/private binary, but women also personally crossed class and race boundaries to defend reproductive rights. Part III explores the wide gender gap in voting patterns and the importance of women's political representation. Women's issues, voices, and votes are increasingly important to electoral success as well as a balanced public agenda. All three parts of this article reveal a pattern of feminist progress and conservative pushback that is likely to continue into the future.

### I. Feminist Organizing and the New Tools of Democratic Participation

Feminist movements differ in time and place but are related through "their challenge of patriarchy."<sup>8</sup> Second-wave feminism, the movement for gender equality that arose in America in the 1960s and lasted into the early 1980s, appropriated the tenets of participatory democracy.<sup>9</sup> These feminists intentionally sought an organizational form that was the opposite of a patriarchal, hierarchical structure, especially given the limitations of formal representative democracy.<sup>10</sup> The result was a community-based, collective movement that encouraged discussion, consciousness-raising, and narrative.<sup>11</sup> "The feminist movement, thus constructed as a *site* of democratic politics, was also perceived to be a *source* of democratization in society."<sup>12</sup> Yet this intense form

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8. Karen Beckwith, *Beyond Compare? Women's Movements in Comparative Perspective*, in WOMEN, GENDER, AND POLITICS: A READER 29, 29 (Mona Lena Krook & Sarah Childs eds., 2010). "Feminist movements share a gendered power analysis of women's subordination and contest political, social, and other power arrangements of domination and subordination on the basis of gender." *Id.*

9. See Squires, *supra* note 5, at 366–67.

10. See *id.*; see also CATHERINE ESCHLE, GLOBAL DEMOCRACY, SOCIAL MOVEMENTS & FEMINISM 118 (2000) (discussing the features of the second-wave feminist movement); Phillips, *supra* note 5, at 68 (discussing how women's groups in the 1960s and 1970s distrusted hierarchy in democracy and advocated for democratic participation).

11. See Sylvia Bashevkin, *Facing a Renewed Right: American Feminism and the Reagan/Bush Challenge*, 27 CAN. J. OF POL. SCI. 669, 676 (1994); ESCHLE, *supra* note 10, at 118 ("Every participant was given the right and opportunity to participate in the decision[-]making of the group or meeting."); Higgins, *supra* note 6, at 1686 (describing consciousness-raising as "commitment to women's articulated experience").

12. ESCHLE, *supra* note 10, at 119.

of democracy had its drawbacks. It not only made decision-making difficult and time-consuming, but it also favored some voices more than others, i.e., it may not have been democratic enough.<sup>13</sup> The movement has long been criticized for failing to confront racism and thus privileging the voices of white, middle-class women over women of color and low-income women.<sup>14</sup> Even as the feminist movement became increasingly professionalized within national advocacy organizations,<sup>15</sup> inclusivity remained a challenge.<sup>16</sup>

Nevertheless, the response to the War on Women revitalized the political arm of the feminist movement by merging second-wave and third-wave approaches to activism.<sup>17</sup> The movement fused both grassroots and professionalized approaches to social action, with both arms of the movement taking advantage of social media, a favored tool of today's third-wave feminists.<sup>18</sup> For instance, in Mississippi in November 2011, voters defeated a proposed "personhood" amendment that would have defined the term "person" under the state constitution to include a fertilized egg, thereby criminalizing all abortions and possibly outlawing

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13. See *id.* at 120–21 (describing the critiques and rejoinders); Phillips, *supra* note 5, at 74 ("The false unities of 'sisterhood' imposed tremendous pressure towards reaching a common consensus," which was inconsistent with other feminist goals of autonomy.).

14. See ESCHLE, *supra* note 10, at 122–24, 127. Studies of professional advocacy groups, including feminist groups, confirm that "while advocacy groups provide some representation for their disadvantaged members, they are substantially less active when it comes to issues affecting disadvantaged subgroups than they are when it comes to issues affecting more advantaged subgroups." Dara Z. Strolovich, *Do Interest Groups Represent the Disadvantaged? Advocacy at the Intersections of Race, Class, and Gender*, in WOMEN, GENDER, AND POLITICS, *supra* note 8, at 55, 55.

15. See Bashevkin, *supra* note 11, at 677–78 (describing goals and strategies of the National Organization of Women and other Washington-based advocacy groups for women).

16. See *id.* at 678 ("American feminism . . . came under increasing criticism in the late 1970s and following for its predominantly white, middle-class leadership, and for its neglect of the class and racial dimensions of female experience.").

17. Feminists have long debated whether social change is best generated by working within state institutions (liberal feminism) or outside state institutions (radical feminism and forms of socialist and poststructuralist feminism). See Mona Lena Krook & Sarah Childs, *Women, Gender and Politics: An Introduction*, in WOMEN, GENDER, AND POLITICS, *supra* note 8, at 3, 5–7, 12 (summarizing the debates).

18. "The third-wave is generally marked by its confessional, narrative approach; its emphasis on sexual empowerment and liberation; its anti-essentialist perspective; and its embrace of technology as a tool of the movement." Michele Estrin Gilman, *Welfare, Privacy, and Feminism*, 39 U. BALT. L.F. 1, 20 (2008). On third-wave feminism generally, see Bridget J. Crawford, *Toward a Third-Wave Feminist Legal Theory: Young Women, Pornography and the Praxis of Pleasure*, 14 MICH. J. GENDER & L. 99 (2007) (discussing the emergence of a new feminism that focuses on social change more than legal issues within the context of pornography).

birth control.<sup>19</sup> After passage of a similar law failed twice in Colorado, personhood proponents turned their sights to Mississippi, figuring the Southern, conservative climate would make it an easy sell.<sup>20</sup> The personhood movement had money and organizing savvy, and the support of many Mississippi politicians, including Democrats.<sup>21</sup>

In the face of this onslaught, the American Civil Liberties Union and Planned Parenthood poured resources and activists into the state.<sup>22</sup> Importantly, “doctors, clergy, and average Mississippians started voicing their opposition” in protests and through social media,<sup>23</sup> including two local mothers who became the public face of the fight. Cristen Hemmins, a rape survivor, pointed out the lack of exceptions for rape in the law,<sup>24</sup> while Atlee Breland started Parents Against Personhood, arguing that the personhood amendment would outlaw in vitro fertilization, which she used to have her own children.<sup>25</sup> College students also organized against the bill.<sup>26</sup> The opposition coalition drew strength

19. See Aaron Blake & Rachel Weiner, *Ohio Repeals Law Restricting Unions; Mississippi Blocks ‘Personhood’ Amendment*, WASH. POST, Nov. 8, 2011, [http://articles.washingtonpost.com/2011-11-08/politics/35281409\\_1\\_personhood-amendment-unions-republican-governors](http://articles.washingtonpost.com/2011-11-08/politics/35281409_1_personhood-amendment-unions-republican-governors). For a scholarly overview of personhood laws, see Maya Manian, *Lessons From Personhood’s Defeat: Abortion Restrictions and Side Effects on Women’s Health*, 74 OHIO STATE L.J. 75,101 (2013) (suggesting that opponents of abortion restrictions frame arguments in terms of women’s health).

20. See Irin Carmon, *How Mississippi Beat Personhood*, SALON (Nov. 9, 2011, 6:30 AM), [http://www.salon.com/2011/11/09/how\\_mississippi\\_beat\\_personhood/](http://www.salon.com/2011/11/09/how_mississippi_beat_personhood/) [hereinafter Carmon, *Personhood*].

21. See Blake & Weiner, *supra* note 19.

22. Patrik Jonsson, *Mississippi ‘Personhood’ Measure: Why Support Waned as Election Day Neared*, CHRISTIAN SCI. MONITOR (Nov. 8, 2011), <http://www.csmonitor.com/USA/2011/1108/Mississippi-personhood-measure-why-support-waned-as-Election-Day-neared>.

23. Carmon, *Personhood*, *supra* note 20; see also Denise Grady, *Medical Nuances Drove ‘No’ Vote in Mississippi*, N.Y. TIMES, Nov. 14, 2011, at D1, available at <http://www.nytimes.com/2011/11/15/health/policy/no-vote-in-mississippi-hinged-on-issues-beyond-abortion.html?pagewanted=all>.

24. Carmon, *Personhood*, *supra* note 20; see Mallory Simon, *Mississippi Gov. Supports Amendment to Declare Fertilized Egg a Person*, CNN.COM, <http://www.cnn.com/2011/11/04/us/mississippi-personhood-amendment/index.html> (last updated Nov. 7, 2011, 11:47 AM).

25. See Valerie Wells, *Personhood: A Pandora’s Box*, JACKSON FREE PRESS (Nov. 2, 2011, 7:47 PM), <http://www.jacksonfreepress.com/news/2011/nov/02/personhood-a-pandoras-box>.

26. David Miller, *MSU Students Organize Protest of ‘Personhood Amendment,’* DISPATCH (Oct. 12, 2011, 12:28 PM), <http://www.cdspatch.com/news/article.asp?aid=13494&TRID=1&TID=>; Francesca Witcher, *How Students at Historically Black Colleges Drove the Mississippi ‘Personhood’ Defeat*, MS. MAG. BLOG (Nov. 10, 2011), <http://msmagazine.com/blog/blog/2011/11/10/defending-roe-in-mississippi/>.

from its diversity and local roots: “no one could call the conservative Mississippi State Medical Association, the Episcopal and Catholic bishops, and a Southern Baptist minister in the Delta tools of Planned Parenthood.”<sup>27</sup> The referendum ultimately failed.

Thus, the fight against the Mississippi personhood law contained elements of second-wave feminist strategies, such as an emphasis on consciousness-raising through personal stories, grassroots organizing, and public demonstrations, as well as third-wave feminist tactics of publicity, protest via social media, and a diverse (non-essentialist) coalition of opponents, including feminists and many people who do not identify with feminist causes. In short, the opposition movement proved to be quick, localized, and broad-based in harnessing multiple tools of democracy to fight gender oppression. Similar social media barrages emerged throughout the War on Women, proving extremely effective in mobilizing public opinion.

Still, the sobering reality is that Mississippi already has stringent anti-choice laws on the books requiring parental or judicial consent for minors seeking abortions, mandatory counseling, and a 24-hour waiting period after counseling before an abortion can be provided.<sup>28</sup> Mississippi remains a state with only one abortion clinic and has the unfortunate distinction of being the state with the “highest rates of teen pregnancy,” unwanted pregnancy, and infant mortality.<sup>29</sup> These restrictions fall most harshly on poor women, who are disproportionately women of color.<sup>30</sup> Feminism and democracy still struggle to reflect the intersectional interests of poor women,<sup>31</sup> although as noted

27. Carmon, *Personhood*, *supra* note 20.

28. See GUTTMACHER INST., STATE FACTS ABOUT ABORTION: MISSISSIPPI (2011), available at <http://www.guttmacher.org/pubs/sfaa/mississippi.html>; Irin Carmon, *The Next Front in the Abortion Wars: Birth Control*, SALON (Oct. 26, 2011, 6:00 AM), [http://www.salon.com/2011/10/26/the\\_next\\_front\\_in\\_the\\_abortion\\_wars\\_birth\\_control/](http://www.salon.com/2011/10/26/the_next_front_in_the_abortion_wars_birth_control/) [hereinafter Carmon, *Abortion Wars*].

29. Carmon, *Abortion Wars*, *supra* note 28; see Emily Le Coz, *Mississippi's Last Abortion Clinic Faces Closure*, CHI. TRIB. (Nov. 28, 2012), [http://articles.chicagotribune.com/2012-11-28/lifestyle/sns-rt-us-usa-abortion-mississippi8ar18v-20121128\\_1\\_jackson-women-s-health-organization-clinic-owner-diane-derzis-strictest-abortion-laws](http://articles.chicagotribune.com/2012-11-28/lifestyle/sns-rt-us-usa-abortion-mississippi8ar18v-20121128_1_jackson-women-s-health-organization-clinic-owner-diane-derzis-strictest-abortion-laws).

30. See HIGHER HEIGHTS FOR AMERICA, BLACK WOMEN'S RESPONSE TO THE WAR ON WOMEN 3 (2012), available at [http://www.higherheightsforamerica.org/images/pdfs/BlackWomens\\_Response\\_to\\_WarOnWomen.pdf](http://www.higherheightsforamerica.org/images/pdfs/BlackWomens_Response_to_WarOnWomen.pdf).

31. One organization of Black women contended that the debates over the War on Women were insufficiently attuned to the voices of Black women, who are disproportionately impacted by restrictions on reproductive choice, access to health care, and voting. See *id.* at 1.

below, there is an emerging cross-class unity on issues of reproductive health. Personhood proponents remain undaunted and are gearing up to push personhood laws in other states.<sup>32</sup> Rejecting incremental approaches to chipping away at *Roe v. Wade*, proponents of personhood laws and other extreme limits on abortion hope to change the dialogue around reproductive rights and thereby make the extreme sound mainstream.<sup>33</sup>

A similar dynamic emerged in February 2011, when the Republican Governor of Virginia, Bob McDonnell, ignited a firestorm by promising to sign a bill requiring transvaginal ultrasounds for any woman seeking an abortion.<sup>34</sup> At the state capital, a thousand people, mostly women, linked arms in a silent protest, and late night comedians mercilessly mocked the bill.<sup>35</sup> Other critics compared the law to rape, as it amounts to forcible penetration for no medical reason.<sup>36</sup> Here too, the opposition forces used both old and new forms of protest to put public pressure on the governor. Chastened by the uproar, Governor McDonnell backed down, but he nevertheless signed legislation making Virginia the eighth state to require abdominal ultrasounds prior to abortion regardless of medical necessity.<sup>37</sup> At least twenty states

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32. See Richard Fausset, *Mississippi's Defeated Antiabortion Measure May Be Just the Beginning*, L.A. TIMES (Nov. 9, 2011), <http://articles.latimes.com/2011/nov/09/nation/la-na-mississippi-personhood-20111110>.

33. See Erik Eckholm, *Push for 'Personhood' Amendment Represents New Tack in Abortion Fight*, N.Y. TIMES, Oct. 25, 2011, at A16, available at <http://www.nytimes.com/2011/10/26/us/politics/personhood-amendments-would-ban-nearly-all-abortions.html?pagewanted=all&r=0>.

34. See Jessica Grose, *Virginia Gov. Bob McDonnell Backs off the Invasive Ultrasound Law*, SLATE (Feb. 22, 2012, 11:10 AM), [http://www.slate.com/blogs/xx\\_factor/2012/02/22/virginia\\_gov\\_bob\\_mcdonnell\\_changes\\_his\\_mind\\_about\\_ultrasound\\_law.html](http://www.slate.com/blogs/xx_factor/2012/02/22/virginia_gov_bob_mcdonnell_changes_his_mind_about_ultrasound_law.html) (comparing the governor's early support for the bill with his later change of heart).

35. See Laura Vozzella & Anita Kumar, *Nitty-Gritty Knocked Va. Abortion Bill Off the Fast Track*, WASH. POST (Feb. 23, 2012), [http://articles.washingtonpost.com/2012-02-23/local/35444075\\_1\\_invasive-ultrasound-abortion-bill-vaginal-probe](http://articles.washingtonpost.com/2012-02-23/local/35444075_1_invasive-ultrasound-abortion-bill-vaginal-probe).

36. Lithwick, *supra* note 1. But see Carole Joffe, *Crying Rape: Pro-Choice Advocates Should Quit Calling Ultrasounds Rape*, SLATE (Feb. 29, 2012, 12:30 PM), [http://www.slate.com/articles/double\\_x/doublex/2012/02/transvaginal\\_ultrasounds\\_why\\_pro\\_choice\\_advocates\\_shouldn\\_t\\_call\\_them\\_rape\\_.html](http://www.slate.com/articles/double_x/doublex/2012/02/transvaginal_ultrasounds_why_pro_choice_advocates_shouldn_t_call_them_rape_.html) (describing the risks of framing the issue in this way).

37. See Irin Carmon, *A Pro-Choice Win in Virginia, Assisted by "Saturday Night Live,"* SALON (Feb. 22, 2012, 3:00 PM), [http://www.salon.com/2012/02/22/a\\_pro\\_choice\\_win\\_in\\_virginia\\_assisted\\_by\\_saturday\\_night\\_live/](http://www.salon.com/2012/02/22/a_pro_choice_win_in_virginia_assisted_by_saturday_night_live/); Erik Eckholm & Kristen Severson, *Virginia Passes Ultrasound Bill as Other States Take Notice*, N.Y. TIMES, Feb. 28, 2012, at A9.

regulate the use of ultrasounds by abortion providers.<sup>38</sup> Given that ultrasounds are not medically necessary for first trimester abortions, the procedure is designed to “personify the fetus and dissuade a woman from obtaining an abortion.”<sup>39</sup>

Mandatory ultrasounds are only one of many abortion restrictions that socially conservative legislators at both the federal and state levels have aggressively pursued in recent years. In 2011, state legislatures enacted ninety-two provisions that restricted access to abortion services, which was nearly three times the number of restrictions that passed in 2005.<sup>40</sup> In the first half of 2012, states enacted thirty-nine such laws.<sup>41</sup> These restrictions included new bans on abortion at twenty weeks, mandatory waiting periods between counseling and the procedure, measures that force women to listen to a fetal heartbeat, counseling on the (unsubstantiated) link between mental health issues and abortion, limits on insurance coverage, bans on telemedicine (often relied on to provide health care in rural areas), and increased regulation of clinics.<sup>42</sup> The result is that “[fifty-five percent] of women of reproductive age in the United States live in one of the [twenty-six] states considered hostile to abortion.”<sup>43</sup> The experiences in Virginia and Mississippi demonstrate that with sufficient public pressure, specific bills can be defeated, but given the avalanche of bills that are proposed, relatively few receive that sort of sustained opposition.<sup>44</sup> These laws pop up with frequency, and like a carnival whack-a-mole, require persistent attention and

38. See Lena H. Sun, *Virginia Ultrasound Bill Joins Other States' Measures*, WASH. POST (Feb. 26, 2012), [http://articles.washingtonpost.com/2012-02-26/national/35444160\\_1\\_abortion-providers-ultrasound-illegal-abortions](http://articles.washingtonpost.com/2012-02-26/national/35444160_1_abortion-providers-ultrasound-illegal-abortions).

39. GUTTMACHER INST., STATE POLICIES IN BRIEF AS OF NOVEMBER 1, 2013: REQUIREMENTS FOR ULTRASOUND, [http://www.guttmacher.org/statecenter/spibs/spib\\_RFU.pdf](http://www.guttmacher.org/statecenter/spibs/spib_RFU.pdf) (last visited Nov. 8, 2013).

40. *State Center, Laws Affecting Reproductive Health and Rights: 2011 State Policy Review*, GUTTMACHER INST., <http://www.guttmacher.org/statecenter/updates/2011/statetrends42011.html> (last visited Sept. 30, 2013) [hereinafter *2011 State Policy Review*].

41. *Media Center, 2012 Saw Second-Highest Number of Abortion Restrictions Ever*, GUTTMACHER INST., (Jan. 2, 2013), <http://www.guttmacher.org/media/inthenews/2013/01/02/index.html>.

42. GUTTMACHER INST., STATE POLICIES IN BRIEF AS OF JANUARY 1, 2013: AN OVERVIEW OF ABORTION LAWS (on file with the *Law and Inequality: A Journal of Theory and Practice*).

43. *State Center, Laws Affecting Reproductive Health and Rights: State Trends at Midyear, 2012*, GUTTMACHER INST., <http://www.guttmacher.org/statecenter/updates/2012/statetrends22012.html> (last visited Sept. 30, 2013).

44. *2011 State Policy Review*, *supra* note 40.



opposition if there is any hope of defeating them. The war on women's reproductive rights is a long-term siege and will require the full range of traditional and emerging feminist organizing strategies to preserve and expand existing rights.

## II. Women's Issues, Interests, and Identity

As third-wave feminists have emphasized, women are not a monolithic interest group.<sup>45</sup> Further, most women do not identify as feminists,<sup>46</sup> and many women vote for politicians and policies that further gender oppression.<sup>47</sup> Even within feminism, there are multiple viewpoints and disagreements about the goals and strategies for effectuating gender equality.<sup>48</sup> While democracy provides a space for all these voices and perspectives to be heard, some feminists have argued that formal democracy alone is not enough to protect women.

Tracy Higgins explained in 1997 why courts should review and sometimes even reverse democratic outcomes in order to ensure equal protection on the basis of gender. Constitutional theory presumes an autonomous, self-defining individual and thus justifies "state action as the legitimate expression of popular will."<sup>49</sup> Feminists have countered that this liberal view of individual agency does not capture women's experiences under patriarchy.<sup>50</sup> Instead, people's preferences are socially constructed,<sup>51</sup> such that "women's choices should be understood as

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45. Phillips, *supra* note 5, at 76 ("[C]ontemporary theory speaks almost with one voice in regarding female identity as multiple, unstable, something to be created and recreated, rather than simply uncovered."); Maxine Molyneux, *Mobilization Without Emancipation? Women's Interests, the State, and Revolution in Nicaragua*, in WOMEN, GENDER, AND POLITICS, *supra* note 8, at 21, 22 ("Although it is true that at a certain level of abstraction women can be said to have some interests in common, there is no consensus over what these interests are or how they are to be formulated.").

46. Sean Alfano, *Poll: Women's Movement Worthwhile*, CBSNEWS.COM (Feb. 11, 2009, 7:03 PM), [http://www.cbsnews.com/2100-500160\\_162-965224.html](http://www.cbsnews.com/2100-500160_162-965224.html) (discussing a CBS News Poll showing that twenty-four percent of women identified as feminists, although this "may have more to do with the feminist label than with views on goals of the women's movement").

47. Joanna L. Grossman & Linda C. McClain, *Introduction*, in GENDER EQUALITY: DIMENSIONS OF WOMEN'S EQUAL CITIZENSHIP 1, 4 (Linda C. McClain & Joanna L. Grossman eds., 2009) ("When sex equality becomes an official public value, one that government affirms and promotes, new challenges arise from the evident tension between this and other fundamental values such as freedom of religion.").

48. Higgins, *supra* note 6, at 1687–88.

49. *Id.* at 1666.

50. *Id.* at 1690.

51. *Id.* at 1691.

neither fully free nor completely determined."<sup>52</sup> In other words, "[h]ow can a citizen meaningfully consent if her nature and beliefs are themselves a product of the system to which she consents?"<sup>53</sup> Situated within certain cultural norms of "language, law, myth, [and] custom" some "individuals may not be the best judges of their own interests or those of the community."<sup>54</sup> This is a controversial view of agency. An alternate view is that women may support policies that are not in the strategic interest of their gender because changes "could threaten the short-term practical interests of some women, or entail a cost in the loss of forms of protection which are not then compensated for in some way."<sup>55</sup> However, under either conception of agency, the failure of democratic processes to ensure gender equality means that judicial review can be necessary to check majority outcomes.<sup>56</sup>

The response to the War on Women shows not only the need for a check on majoritarian processes, but also an increased potential for securing women's rights within formal democracy due to the emergence of broader conceptions of "women's issues" and women's self-interest. It appears that women are increasingly attuned to how law and politics shape their own realities—they see their own socially constructed identities. For one thing, women's issues are becoming more broadly defined. Traditionally, women's issues have been compartmentalized into issues relating to the public sphere, such as workplace fairness, and those impacting the private sphere, such as reproductive rights and freedom from abuse.<sup>57</sup> This division not only isolated "women's issues" as if they did not impact the entire polity, but also made it easy for politicians and voters to pick and choose the policies they

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52. *Id.*

53. *Id.* at 1695.

54. *Id.* at 1691, 1696.

55. Molyneux, *supra* note 45, at 23 ("[I]t is the politicization of these practical interests and their transformation into strategic interests that women can identify with and support which constitutes a central aspect of feminist political practice.").

56. Higgins, *supra* note 6, at 1698. Of course, whether courts are up to the task is also hotly debated within feminist theory. See, e.g., Rogers M. Smith, *Gender at the Margins of Contemporary Constitutional Citizenship*, in *GENDER EQUALITY: DIMENSIONS OF WOMEN'S EQUAL CITIZENSHIP*, *supra* note 47 at 23, 24 ("[T]he most important tasks in restructuring American institutions to remove barriers to meaningfully equal citizenship for women and men now go far beyond the capacities and the legitimate authority of the judiciary . . .").

57. The public/private divide within law is a central concern of feminism. See, e.g., Carole Pateman, *Feminist Critiques of the Public/Private Dichotomy*, in *PUBLIC AND PRIVATE IN SOCIAL LIFE* 281 (S.I. Benn & G.F. Gaus eds., 1983); Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 *STAN. L. REV.* 1 (1992); Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 *HARV. L. REV.* 1497 (1983).

avored as if the options were not interrelated. By contrast, in the recent election cycle, public dialogue and feminist framing broke down the barriers between the public and the private.

President Obama, in particular, was effective in linking economic issues to reproductive rights. Throughout the presidential campaign, both Governor Mitt Romney and President Barack Obama courted the women's vote, as exemplified in the second presidential debate on October 16, 2012.<sup>58</sup> During the debate, Romney attempted to sever social from economic issues, emphasizing his experience in job creation and asking women to focus on the economy.<sup>59</sup> By contrast, Obama resisted this divide, linking reproductive health and choice to the economic security of families.<sup>60</sup> As he put it, access to affordable family planning "makes a difference in whether they can go out there and—and earn a living for their family. These are not just women's issues. These are family issues. These are economic issues."<sup>61</sup> Clearly, a lack of access to family planning resources limits women's abilities to obtain education, hold jobs, have healthy children, and provide for their families.<sup>62</sup> Indeed, the entire War on Women looked like an attempt to push women out of the public sphere and back into the private domain of the home.

The debate also allowed Obama to tout his own efforts to promote equal pay, in light of the fact that women earn seventy-two cents for every dollar earned by a man.<sup>63</sup> He said, "[t]his is not just a women's issue, this is a family issue, this is a middle-class issue, and that's why we've got to fight for it."<sup>64</sup> Thus, he highlighted the first bill he signed in office, the Lilly Ledbetter Fair Pay Act, which reversed a Supreme Court ruling in order to make it easier for female workers to file equal pay claims.<sup>65</sup> For his part, Romney would not say whether or not he would have supported the Act, but it is perhaps telling that he identified the

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58. Sarah Kliff, *Full Transcript of the Second Presidential Debate*, WASH. POST (Oct. 16, 2012), <http://www.washingtonpost.com/blogs/wonkblog/wp/2012/10/16/full-transcript-of-the-second-presidential-debate/> [hereinafter *Debate Transcript*].

59. For instance, Romney stated, "I'm going to help women in America get good work by getting a stronger economy and by supporting women in the workforce." *Id.*

60. *Id.*

61. *Id.*

62. *See id.*

63. *Id.*

64. *Id.*

65. *Id.*

four Supreme Court Justices who supported the cramped reading of the Equal Pay Act as his ideal jurists.<sup>66</sup>

Further, in trying to bolster his pro-woman credentials, Romney awkwardly boasted that when he was filling slots for his cabinet as Massachusetts governor, he sought and received “whole binders full of women.”<sup>67</sup> The phrase went viral and was the subject of much online jesting. Fact-checkers quickly noted that Romney did not seek out women for cabinet positions; rather, a coalition of nonpartisan women’s groups provided him with the resumes of qualified women.<sup>68</sup> Moreover, the number of women in senior positions declined slightly during his governorship and rose again when he left office.<sup>69</sup> Even Romney’s laser-like focus on economic issues did not seem to acknowledge women’s role in the economy. For instance, he repeatedly stated that he wanted to help unemployed female workers, but he also proposed to shrink government payrolls.<sup>70</sup> Given that most public sector jobs are filled by women, he never explained how he would enhance women’s economic opportunities while simultaneously shrinking government.<sup>71</sup> While Romney acknowledged women’s struggles to achieve a work/life balance, he failed to recognize that men face this same challenge.<sup>72</sup>

The public sector’s importance to women’s economic security also came to a head in the winter of 2011 in Wisconsin, as public unions fought, unsuccessfully, to preserve collective bargaining

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66. See Catalina Camia, *Who Would Romney Appoint to Supreme Court?*, USA TODAY (Oct. 1, 2012), <http://www.usatoday.com/story/onpolitics/2012/10/01/obama-romney-supreme-court-vacancy/1606025/> (stating that Romney’s web page “says he would nominate federal judges in the mold of Scalia, Chief Justice John Roberts, and Justices Clarence Thomas and Samuel Alito.”).

67. *Debate Transcript*, *supra* note 58.

68. Maria Cardona, *Romney’s Empty ‘Binders Full of Women’*, CNN OPINION (Oct. 18, 2012), <http://www.cnn.com/2012/10/17/opinion/cardona-binders-women/index.html>; Matt Viser, *How Mitt Romney Had ‘Whole Binders of Women’ for Staff Positions as Governor*, BOS. GLOBE (Oct. 17, 2012), <http://www.boston.com/politicalintelligence/2012/10/17/binders-full-women-mitt-romney-claim-not-entirely-accurate/jrKRRGSIPqjvuKX8d9q6gL/story.html>;

69. Cardona, *supra* note 68, (describing the results of a study by the University of Massachusetts and the Center for Women in Politics and Public Policy); Viser, *supra* note 68.

70. See, e.g., *Debate Transcript*, *supra* note 58.

71. Bryce Covert, *What Does Mitt Romney Really Want for Women*, THE NATION (Oct. 17, 2012), <http://www.thenation.com/blog/170625/what-does-mitt-romney-really-want-women#>.

72. See *Debate Transcript*, *supra* note 58.

rights.<sup>73</sup> Wisconsin Governor Scott Walker supported a bill removing collective bargaining rights for all public sector workers other than police and firefighters, thereby placing the brunt of the law on women.<sup>74</sup> Whereas the majority of police and firefighters are men, most public sector workers are women, and collective bargaining protects their ability to negotiate for higher wages and improved benefits, issues that hit women particularly hard.<sup>75</sup> Protestors surrounded the state capitol for several weeks, culminating in crowds of up to 100,000 protestors.<sup>76</sup> After extensive legislative machinations and public protests, the legislation passed,<sup>77</sup> and Walker survived a recall movement.<sup>78</sup> Yet in September 2012, a county judge declared the law unconstitutional, and litigation over the law continues.<sup>79</sup> The bottom line is that massive public protest was mobilized on an economic issue that fell most harshly on women, thereby suggesting a greater public awareness of the importance of women's economic success to the fortunes of families and the country. In other words, the interests of women can no longer be cabined as "women's issues."

In addition to expanding notions of "women's issues," the War on Women spurred broader conceptions of women's self-interest. As noted earlier, the feminist movement has long been criticized

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73. Michael Cooper & Katharine Q. Seelye, *Wisconsin Leads Way as Workers Fight State Cuts*, N.Y. TIMES, Feb. 19, 2011, at A1; Steven Walters, *Showdown in Madison*, ST. LEGISLATURES, July–Aug. 2011, at 20–23.

74. Dana Goldstein, *The Wisconsin Labor Fight: An Attack on Women Too* (Feb. 18, 2011, 12:43 PM), [http://www.danagoldstein.net/dana\\_goldstein/2011/02/the-wisconsin-labor-fight-an-attack-on-women-too.html](http://www.danagoldstein.net/dana_goldstein/2011/02/the-wisconsin-labor-fight-an-attack-on-women-too.html) ("[P]redominantly male professions are deliberately protected while female ones are targeted.").

75. Jennifer Clark, *Who Suffers Without Collective Bargaining in Wisconsin? Families.*, INST. FOR WOMEN'S POL'Y RES., <http://www.iwpr.org/blog/2011/03/11/who-suffers-without-collective-bargaining-in-wisconsin-families/> (last updated Mar. 11, 2011) ("[fifty-six] percent of state government workers and [fifty-eight] percent of local government workers in Wisconsin are women."). Moreover, public sector workers are paid less than their equally qualified private sector counterparts. *Id.*

76. James B. Kelleher, *Up to 100,000 Protest Wisconsin Law Curbing Unions*, REUTERS (Mar. 12, 2011), <http://www.reuters.com/article/2011/03/13/usa-wisconsin-idUSN1227540420110313>; Richard A. Oppel, Jr. & Timothy Williams, *Rallies for Labor, in Wisconsin and Beyond*, N.Y. TIMES, Feb. 27, 2011, at A4; Walters, *supra* note 73, at 22.

77. Monica Davey, *Wisconsin Senate Limits Bargaining by Public Workers*, N.Y. TIMES, Mar. 10, 2011, at A1.

78. Monica Davey & Jeff Zeleny, *Walker Survives Wisconsin Recall Vote*, N.Y. TIMES, June 5, 2012, at A1.

79. Steven Greenhouse, *County Judge Strikes Down Some Restrictions on Public Unions in Wisconsin Law*, N.Y. TIMES, Sept. 15, 2012, at A16.

for focusing on the welfare of white, middle-class women.<sup>80</sup> Yet the War on Women spurred many women out of a seeming malaise regarding reproductive rights, which have been under persistent attack by social conservatives. The battle over Planned Parenthood reveals this trend. Planned Parenthood is a major provider of preventative health care to women.<sup>81</sup> Through its almost 800 clinics, Planned Parenthood “assists 800,000 women with life-saving breast exams, more than four million Americans with testing and treatment for sexually transmitted diseases, and 2.5 million people with contraception.”<sup>82</sup> It serves primarily low-income women who lack health insurance.<sup>83</sup> Three percent of the services it provides are abortions,<sup>84</sup> and it is this aspect of care that put Planned Parenthood on the frontlines of the War on Women.

On January 31, 2012, the Susan B. Komen Foundation, a prominent fundraiser in the fight against breast cancer, announced that it would stop awarding grants to Planned Parenthood for breast cancer screenings.<sup>85</sup> A media firestorm ensued, fueled by social media,<sup>86</sup> and the backlash was tremendous and unexpected.<sup>87</sup> Thousands of people threatened to boycott the Komen Foundation and its sponsors, while Planned Parenthood was inundated with financial support from existing and new donors.<sup>88</sup> Bowing to public pressure, the Komen Foundation reversed its position within three days, and several top executives

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80. See *supra* notes 14–16 and accompanying text.

81. See Sarah Primrose, *The Attack on Planned Parenthood: A Historical Analysis*, 19 UCLA WOMEN’S L.J. 165, 204 (2012).

82. *Id.*

83. *Id.* at 204–05.

84. *Id.* at 167. Planned Parenthood does not use federal funds for its abortion services. *Id.*

85. Shari Roan, *Komen Breast Cancer Charity Severs Ties with Planned Parenthood*, L.A. TIMES (Feb. 1, 2012), <http://articles.latimes.com/2012/feb/01/health/la-he-planned-parenthood-komen-20120201>.

86. See Maggie Fox, *Komen Planned Parenthood Funding Debate Plays out on Social-Media Background*, NAT’L J. (Feb. 2, 2012), <http://www.nationaljournal.com/healthcare/komen-planned-parenthood-funding-debate-plays-out-on-social-media-battleground-20120202>.

87. See David Wallis, *Komen Foundation Struggles to Regain Wide Support*, N.Y. TIMES (Nov. 8, 2012), <http://www.nytimes.com/2012/11/09/giving/komen-foundation-works-to-regain-support-after-planned-parenthood-controversy.html?pagewanted=all>.

88. See Sarah Kliff, *For Planned Parenthood, Backlash Pays Off*, WASH. POST, Feb. 5, 2012, at B1; Andrea K. Walker, *Debate Over Komen’s Planned Parenthood Decision Grows in Maryland*, NATION, BALT. SUN (Feb. 3, 2012), [http://articles.baltimoresun.com/2012-02-03/health/bs-hs-komen-planned-parenthood-20120202\\_1\\_susan-g-komen-national-komen-organization-breast](http://articles.baltimoresun.com/2012-02-03/health/bs-hs-komen-planned-parenthood-20120202_1_susan-g-komen-national-komen-organization-breast).

resigned.<sup>89</sup> The Komen Foundation continues to suffer the fallout; donations have dropped, as has participation in its well-known Walk for the Cure.<sup>90</sup>

For his part, Republican candidate Mitt Romney stated during his campaign that he would defund Planned Parenthood and believes that *Roe v. Wade* should be overturned.<sup>91</sup> Accordingly, Planned Parenthood's political arm worked hard to educate voters about Romney's positions.<sup>92</sup> In the end, it was one of the most effective political groups in the 2012 race, as ninety-eight percent of the campaigns that Planned Parenthood supported ultimately prevailed.<sup>93</sup> In short, many women responded with outrage to policies that would have no impact on them personally. Planned Parenthood almost exclusively serves low-income women, thus, middle and upper class women are not individually harmed if Planned Parenthood goes out of business. However, the reaction to the attacks on Planned Parenthood revealed a shared concern for women's autonomy and dignity that crossed class boundaries.

At the same time, it is important to acknowledge that the abortion rights movement has been problematic for women of color for several reasons, including the government's history of forced sterilizations of Black women (and support for these policies by certain feminist groups in the 1970s) and the failure of feminists to rally against Medicaid limitations on abortion services that impact poor women exclusively.<sup>94</sup> Moreover, as Professor Dorothy E. Roberts has explained, low-income women of color face not only governmental restrictions on reproductive choice, but also often lack the material conditions that make choice possible, such as

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89. See Linda Feldmann, *Susan G. Komen Foundation Relents: Planned Parenthood Grants Restored*, CHRISTIAN SCI. MONITOR (Feb. 3, 2012), <http://www.csmonitor.com/USA/Politics/2012/0203/Susan-G.-Komen-Foundation-relents-Planned-Parenthood-grants-restored-video>; Lena H. Sun & Sarah Kliff, *Komen Official Quits Over Planned Parenthood Flap*, WASH. POST, Feb. 8, 2012, at A3; Wallis, *supra* note 87.

90. See Wallis, *supra* note 87.

91. See Michael D. Shear, *THE CAUCUS; Planned Parenthood Enters the Fray*, N.Y. TIMES (May 30, 2012), <http://query.nytimes.com/gst/fullpage.html?res=9B02E4DD103EF933A05756C0A9649D8B63>.

92. See Sarah Kliff, *Planned Parenthood Tops List of Effective Spenders*, WASH. POST, Dec. 6, 2012, at A2.

93. *Id.*

94. See Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1442–43, 1444 & n.132 (1991). The history of Planned Parenthood is also a concern, as its founder supported eugenics in the 1920s. Primrose, *supra* note 81, at 168, 202.

affordable health care and access to contraception.<sup>95</sup> Thus, the feminist movement needs to focus on the "importance of expanding the meaning of reproductive liberty beyond opposing state restrictions on abortion to include broader social justice concerns."<sup>96</sup> Notably, the vast majority of services Planned Parenthood currently provides are for women's preventative health.<sup>97</sup>

It will be essential for the feminist movement to maintain cross-class momentum for reproductive health services, as attacks on Planned Parenthood are continuing in federal and state legislatures and in the courts. Federal law, through the Hyde Amendment, already forbids any federal funding from going toward abortion services.<sup>98</sup> Nevertheless, in February 2011, the House of Representatives voted to bar Planned Parenthood from receiving any federal grants for any purposes.<sup>99</sup> Planned Parenthood rallied its supporters, who bombarded the Hill with calls, e-mails, and petitions, and also held protests across the country.<sup>100</sup> The bill ultimately failed in the Senate.<sup>101</sup>

Undaunted, House Republicans adopted a new strategy. In September 2011, the House Committee on Energy and Commerce launched an investigation of Planned Parenthood and gave the organization two weeks to provide the committee with a full twelve years of internal audit reports and other documentation, such as details about how Planned Parenthood segregates federal funds from those used to provide abortion services.<sup>102</sup> In addition, since

95. See Roberts, *supra* note 94, at 1461.

96. Dorothy E. Roberts, *Unshackling Black Motherhood*, 95 MICH. L. REV. 938, 939 (1997).

97. See Primrose, *supra* note 81, at 204 (explaining preventative healthcare services by Planned Parenthood).

98. See Nicole Huberfeld, *Conditional Spending and Compulsory Maternity*, 2010 U. ILL. L. REV. 751, 769-72 (2010) (describing the history of the Hyde Amendment and its impact). "[T]he Hyde Amendment has been a condition on the federal funding for Medicaid since 1977; though it has not been codified in the Medicaid Act, the ban is written into the regulations for Medicaid." *Id.* at 769; see also Pub. L. No. 94-439, § 209, 90 Stat. 1418, 1434 (1976); 42 C.F.R. § 441.202 (2012).

99. Lisa Mascaro & Kathleen Hennessey, *House Moves on Planned Parenthood*, WASH. POST, Feb. 19, 2011, at A3.

100. See Erik Eckholm, *Planned Parenthood Financing is Caught in Budget Feud*, N.Y. TIMES (Feb. 17, 2011), [http://www.nytimes.com/2011/02/18/us/politics/18parenthood.html?\\_r=0](http://www.nytimes.com/2011/02/18/us/politics/18parenthood.html?_r=0).

101. See Kathleen Hennessey, *Senate Rejects Attempts to Defund Planned Parenthood, Health Reform*, L.A. TIMES (Apr. 14, 2011), <http://articles.latimes.com/2011/apr/14/news/la-pn-health-reform-vote-20110414>.

102. See Mike Lillis, *Dems Hammer GOP's Planned Parenthood Funding Probe*, THE HILL (Sept. 27, 2011, 8:07 PM), <http://thehill.com/homenews/house/184213->



2011, at least a dozen Republican-led states have cut funding to Planned Parenthood.<sup>103</sup> Texas is facing the consequences of its decision to cut off preventative health services for 135,000 women. Projections show that in 2014–15, due to reduced access to birth control, poor women will deliver an estimated 23,760 more babies than they would have, resulting in an additional cost to taxpayers of \$273 million to care for the infants under Medicaid.<sup>104</sup> While courts have struck down most of these state budget cuts to Planned Parenthood, the U.S. Court of Appeals for the Fifth Circuit upheld Texas's cuts.<sup>105</sup> Litigation will thus continue, making a strong feminist movement that includes the interests and voices of low-income women essential.

While the War on Women broadened the scope of feminist organizing, a strategic move by Mitt Romney reinforced how deep the intersection of race, class, and gender is embedded in U.S. politics. Over the summer of 2012, Mitt Romney began running ads attacking President Obama for loosening the work requirements tied to the Temporary Assistance for Needy Families (TANF) program through a new waiver program run by the Department of Health and Human Services (HHS).<sup>106</sup> As Romney put it, “[u]nder Obama’s plan, you wouldn’t have to work and wouldn’t have to train for a job.”<sup>107</sup> Obama retaliated with his own ad, stating the Romney claim was “blatantly false.”<sup>108</sup> Fact-

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dems-hammer-gops-planned-parenthood-investigation; Meghan McCarthy, *Republicans Open Sweeping Investigation into Planned Parenthood*, NAT’L J. (Sept. 27, 2011), <http://www.nationaljournal.com/healthcare/republicans-open-sweeping-investigation-into-planned-parenthood-20110927>.

103. See, e.g., Sandhya Somashekhar, *Planned Parenthood’s Funds Targeted in Political Posturing*, WASH. POST, Oct. 12, 2012, at A4; Rachel Weiner, *Planned Parenthood Still Target*, WASH. POST, May 8, 2012, at A4.

104. See Emily Ramshaw, *Likely Increase in Births Has Some Lawmakers Revisiting Cuts*, N.Y. TIMES, Dec. 7, 2012, at A25.

105. See *Planned Parenthood Loses Funding Fight in 5th Circuit, Wins ‘Small Victory’ in State Court*, *Planned Parenthood v. Suehs*, 23 WESTLAW J. INS. COVERAGE 6, at \*1 (2012), available at 2012 WL 6087551; see also Tina Burnside, *Texas Can Ban Planned Parenthood from Health Program After Court Decision*, CNN (Oct. 26, 2012, 5:49 AM), <http://www.cnn.com/2012/10/26/us/texas-abortion-ruling/index.html>.

106. Molly Moorhead, *Mitt Romney Says Barack Obama’s Plan for Welfare Reform: ‘They Just Send You Your Check,’* POLITIFACT.COM (Aug. 7, 2012), <http://www.politifact.com/truth-o-meter/statements/2012/aug/07/mitt-romney/mitt-romney-says-barack-obamas-plan-abandons-tenet/>. TANF is one of the nation’s welfare programs for poor families. *Id.*

107. *Id.*

108. Alicia M. Cohen, *New Obama TV Ad Calls Romney’s Welfare Attacks ‘Blatantly False,’* THE HILL (Aug. 10, 2012, 11:49 AM), <http://thehill.com/video/campaign/243049-new-obama-tv-ad-calls-romney-welfare-attacks-blatantly-false->.

checkers affirmed Obama's position;<sup>109</sup> HHS would only be considering waivers that would create "more effective mechanisms for helping families succeed in employment."<sup>110</sup> Moreover, the new waiver policy was drafted in response to gubernatorial requests from both parties, as governors wanted more flexibility in developing programs to put welfare recipients to work.<sup>111</sup> Yet in fighting over who was tougher on welfare recipients, both candidates continued the ongoing vilification of welfare mothers. Many felt there was a racial subtext to Romney's ads designed to appeal to White, working class voters<sup>112</sup> given that welfare is linked in the public mind with African-Americans.<sup>113</sup> Indeed, the Romney ads revived the old welfare queen stereotype of poor women of color who cheat taxpayers while living supposedly extravagant lifestyles off the government dole.<sup>114</sup> This stereotype is potent, but it was never true, even before welfare reform.<sup>115</sup> What Romney, Obama, and the media reporting on the dispute failed to confront are the failures of TANF to move families out of poverty, the paltry level of TANF benefits, and the lack of paying work for people who want it—all of which fall disproportionately

109. *Id.*

110. OFFICE OF FAMILY ASSISTANCE, U.S. DEP'T OF HEALTH & HUMAN SERVS., TANF-ACF-IM-2012-03, GUIDANCE CONCERNING WAIVER AND EXPENDITURE AUTHORITY UNDER SECTION 1115, (July 12, 2012), available at <http://www.acf.hhs.gov/programs/ofa/resource/policy/im-ofa/2012/im201203/im201203>.

111. See Seema Mehta & Christi Parsons, *Romney Accuses Obama of Trying to Undo Welfare Reform*, L.A. TIMES (Aug. 8, 2012), <http://articles.latimes.com/2012/aug/08/nation/la-na-romney-welfare-20120808>.

112. See Christopher Roland, *Mitt Romney Ad on Welfare "Handout" is Faulted*, BOS. GLOBE (Sept. 12, 2012), <http://www.bostonglobe.com/news/politics/2012/09/11/mitt-romney-accuses-barack-obama-gutting-work-requirements-welfare-campaign-that-has-been-called-inaccurate/e0mti3JXMVlypXqeKIOVSP/story.html> (quoting Reverend Jesse Jackson); Robert Schlesinger, *Labor Boss Sees Racism in Romney Welfare Attacks*, U.S. NEWS & WORLD REP. (Sept. 4, 2012), <http://www.usnews.com/opinion/blogs/robert-schlesinger/2012/09/04/labor-boss-sees-racism-in-romney-welfare-attacks> (quoting James Hoffa, President of the Teamsters).

113. See MARTIN GILENS, *WHY AMERICANS HATE WELFARE* 5 (1999) ("Most [W]hite Americans believe that [B]lack are less committed to the work ethic than are [W]hites, and this belief is strongly related to opposition to welfare."); PREMILLA NADASEN, *WELFARE WARRIORS*, at xvi (2005) ("Even though African Americans were a minority of welfare recipients, welfare increasingly came to be understood in racial terms and viewed as a program benefiting [B]lack women.").

114. See NADASEN, *supra* note 113, at 194–99 (describing the roots of the stereotype); see also WALTER I. TRATTNER, *FROM POOR LAW TO WELFARE STATE* 362–85 (6th ed. 1999) (describing political responses to perceived welfare crisis).

115. See Michele Estrin Gilman, *Poverty and Communitarianism: Toward a Community-Based Welfare System*, 66 U. PITT. L. REV. 721, 746–47 (2005).

on women.<sup>116</sup> The failure of both candidates to engage meaningfully on the causes of poverty was disheartening, but par-for-the-course in today's politics. The good news was that voters seemed to reject Romney's attacks on "dependence," as women and minorities voted overwhelmingly for Obama.

### III. The Gender Gap

A gender gap drove the 2012 election results, in which women voters sent record numbers of women to Congress, secured the Democratic majority in the Senate, and awarded President Obama a second term. The gender gap has been a stable feature of national politics since around 1980. It appears that the War on Women may have not only revitalized the feminist movement and heightened public awareness of gender inequalities, but also spurred the gender gap to new heights.

#### A. Women's Representation in Congress

The 2012 election resulted in record numbers of women being elected to federal office.<sup>117</sup> There are now twenty female senators; previously, there were fifteen.<sup>118</sup> The election also resulted in several significant firsts, including Senator Tammy Baldwin of Wisconsin, the first openly gay senator; Senator Mazie Hirono of Hawaii, the first Asian-American woman senator; and Representative Tulsi Gabbard of Hawaii, the first Hindu congressperson. There are twenty-eight women of color in the House, the highest number ever.<sup>119</sup> Women now constitute eighteen percent of the House and Senate,<sup>120</sup> and while these

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116. See DANILO TRISI & LADONNA PAVETTI, CTR. FOR BUDGET POLICIES & PRIORITIES, TANF WEAKENING AS A SAFETY NET FOR POOR FAMILIES (2012), available at <http://www.cbpp.org/files/3-13-12tanf.pdf>. For a more general discussion on TANF, see, e.g., CTR. FOR BUDGET POLICIES & PRIORITIES, AN INTRODUCTION TO TANF (2012), available at <http://www.cbpp.org/files/7-22-10tanf2.pdf>; SHEILA R. ZEDLEWSKI, URBAN INST., WELFARE REFORM, WHAT HAVE WE LEARNED IN FIFTEEN YEARS? (2012), available at <http://www.urban.org/UploadedPDF/412539-Welfare-Reform-What-Have-We-Learned-in-Fifteen-Years.pdf>.

117. See Janet Cook, *Another 'Year of Women' in Congress*, WALL ST. J., Nov. 9, 2012, at A4.

118. *Id.*

119. See Abigail Pesta, *The 2012 Election Brings a Stunning Array of Firsts for Women in Congress*, DAILY BEAST (Nov. 8, 2012), <http://www.thedailybeast.com/articles/2012/11/08/2012-election-brings-stunning-array-of-firsts-for-women-in-congress.html>.

120. CTR. FOR AM. WOMEN & POLITICS, WOMEN IN THE U.S. CONGRESS 2013, available at [http://www.cawp.rutgers.edu/fast\\_facts/levels\\_of\\_office/documents/cong.pdf](http://www.cawp.rutgers.edu/fast_facts/levels_of_office/documents/cong.pdf); see Pesta, *supra* note 119.

increases are an improvement, the percentage is obviously far below the proportion of women in the population. The United States ranks ninety-first in the world in the number of women in the national legislature.<sup>121</sup> Likewise, at the state and local levels, more than three-quarters of elected officials are men.<sup>122</sup> Given these bleak numbers, both here and abroad, feminists have wrestled with why women's political representation remains so low, whether this matters, and what to do about it.

The disparity in the United States arises not from discrimination—women win races at the same rate as men—but because women run for office far less frequently than men<sup>123</sup> due to significant obstacles that men do not face.<sup>124</sup> Women are more likely to view the political process as biased against them (especially after the harsh attacks on Hillary Rodham Clinton and Sarah Palin in the 2008 presidential race), have lower confidence in their qualifications, are more risk averse, are less likely to be recruited for office, and bear greater family responsibilities than men.<sup>125</sup> In addition, the political structure in the United States, with its two-party system, is less amenable to women candidates than alternative structures that elect multiple candidates, such as proportional representation and parliamentary systems.<sup>126</sup>

Do the low numbers of women in political office matter? On the one hand, women do not necessarily share joint interests or subscribe to gender-based identities.<sup>127</sup> Representative Michele

121. JENNIFER L. LAWLESS & RICHARD L. FOX, *WOMEN & POLITICS INST.*, AM. UNIV., *MEN RULE: THE CONTINUED UNDER-REPRESENTATION OF WOMEN IN U.S. POLITICS 2* (2012), available at <http://www.american.edu/spa/wpi/upload/2012-Men-Rule-Report-web.pdf>.

122. *Id.* at 1.

123. *Id.* at 2.

124. *Id.* at 3.

125. *Id.* at ii.

126. See Eileen McDonagh, *Citizenship and Women's Election to Political Office: The Power of Gendered Public Policies*, in *GENDER EQUALITY: DIMENSIONS OF WOMEN'S EQUAL CITIZENSHIP*, *supra* note 47, at 201, 204 n.10. Professor McDonagh argues that more women hold office in countries that "adopt gendered public policies that associate the government with traits the public associates with women's maternal group difference from men," *id.* at 226, such as electoral gender quotas for public office or a constitutional commitment to welfare provision, *id.* at 216–17. Peters and Suter argue against electoral quotas in part because emphasizing shared interests of women "carr[ies] the danger of resurrecting dormant gender stereotypes" and can lead to "reproach[ing] deviant women as having false consciousness." Anne Peters & Stefan Suter, *Representation, Discrimination, and Democracy: A Legal Assessment of Gender Quotas, in Politics*, in *GENDER EQUALITY: DIMENSIONS OF WOMEN'S EQUAL CITIZENSHIP*, *supra* note 47, at 174, 191. Still, after a review of the literature, they conclude that having more women in political office has an impact on laws and policy. *Id.* at 196.

127. See Squires, *supra* note 5, at 368.

Bachmann will not be voting the same as Minority Leader Nancy Pelosi.<sup>128</sup> Moreover, just because women are situated differently than men does not mean that “women are conscious of these differences [or] that they define themselves as having special interests requiring representation.”<sup>129</sup> Like all women, female politicians have multiple identities, and gender may not be as important as other self-identities, such as race, religion, or party affiliation. Women may be better off with politicians committed to gender equality, regardless of whether they are men or women. On the other hand, studies show that the political participation of women changes the political agenda and content of debates, as well as serves an important symbolic and role model function.<sup>130</sup>

Significantly, women politicians believe their presence as women makes a difference to democracy. As Senator Barbara Mikulski, the longest serving female member of the Senate, recently explained, women in Congress have made a difference by focusing not only on the “macro” issues, but also the “macaroni and cheese” issues; that is, day-to-day issues that are important to families.<sup>131</sup> Likewise, she described how the addition of women to Congress has impacted women’s health issues by leading to the inclusion of women in study protocols at the National Institutes of Health (NIH) and the appointment of a woman to head NIH under the Bush Administration.<sup>132</sup> By contrast, Mikulski noted that if more women had been in the Senate in 1992 during the confirmation hearings on Justice Clarence Thomas, the attacks on Anita Hill, who alleged that Clarence Thomas had sexually harassed her, would not have been as “awful” and “horrific.”<sup>133</sup> Mikulski’s experience confirms that women legislators do not

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128. Rep. Bachmann (R-Minn.) is a Tea Party conservative; Rep. Pelosi (D-Cal.) is a liberal and former Speaker of the House of Representatives. When the 2011 vote to defund Planned Parenthood was taken on the House floor, Bachmann voted in favor and Pelosi voted against. See HOUSE ROLL CALL NO. 93, 112TH CONG. (2011), <http://clerk.house.gov/evs/2011/roll093.xml>.

129. See Squires, *supra* note 5, at 368 (quoting Sapiro 1998: 167); see also Andrea Cornwall and Ann Marie Goetz, *Democratizing Democracy: Feminist Perspectives*, 12 DEMOCRATIZATION 783, 784 (2005) (“[T]here is no straightforward equation between getting women into political office and the pursuit of policies of gender equality by these same women.”).

130. See studies cited in LAWLESS & FOX, *supra* note 121, at Appendix A; see also Karen L. Tamerius, *Sex, Gender, and Leadership in the Representation of Women*, in WOMEN, GENDER, AND POLITICS, *supra* note 8, at 243, 248–49 (finding that congresswomen “provide the bulk of the leadership on feminist issues”).

131. Senator Barbara Mikulski, *Comments of Barbara Mikulski at the 5th Annual Feminist Legal Conference at the University of Baltimore School of Law*, at 0:51:26 (Mar. 2, 2012), <http://www.mikulski.senate.gov/media/video/3-2-2012.cfm>.

132. *Id.* at 0:54:08.

133. *Id.* at 0:19:14.

agree on all issues, but their presence makes a difference. Thus, feminists need to keep working to overcome the cultural and structural barriers that keep qualified women from seeking office.

Indeed, it is hard to imagine that if Congress were fifty percent female (or more), there would have been a congressional hearing about the legality of employer-provided contraception in which the only witnesses were socially conservative men. It used to be that contraception, as a way of preventing unwanted pregnancies, was the rare area of agreement between pro-life and pro-choice activists.<sup>134</sup> However, pro-life forces are increasingly attacking contraception as part of a "larger agenda, which is putting sex back into the box, as something that happens only within marriage."<sup>135</sup>

The controversy over contraception came to a head when the Obama Administration announced a final rule implementing the Affordable Care Act in April 2012.<sup>136</sup> The rule requires insurers to provide contraception coverage free of charge.<sup>137</sup> Religious organizations such as churches, synagogues, and mosques are excluded from the rule due to free exercise principles.<sup>138</sup> However, the rule covers religiously affiliated institutions, such as hospitals and universities.<sup>139</sup> The U.S. Conference of Roman Catholic Bishops immediately objected to the rule, as the Catholic faith does not support contraception despite the widespread use of contraception by practicing Catholics.<sup>140</sup> The bishops and other religious conservatives framed their objection as an issue of religious freedom, rather than reproductive freedom.<sup>141</sup> Candidate Mitt Romney picked up on this theme, stating that the contraception mandate was "an assault on religion."<sup>142</sup>

134. See Primrose, *supra* note 81, at 196.

135. *Id.* (quoting William Smith, Vice President for public policy for the Sexuality Information and Education Council of the United States, as quoted in Russell Shorto, *Contra-Contraception*, N.Y. TIMES MAG., May 7, 2006, available at <http://www.nytimes.com/2006/05/07/magazine/07contraception.html?pagewanted=all>).

136. See Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725 (Feb. 15, 2012).

137. See *id.* at 8725.

138. See *id.* at 8726.

139. Louise Radnofsky, *Catholic Leaders Blast Rule on Contraception Coverage*, WALL ST. J., Jan. 25, 2012, at A4.

140. See *id.*

141. See Erik Eckholm, *Both Sides Eager to Take Birth Control Coverage Issue to Voters*, N.Y. TIMES, Feb. 16, 2012, at A18.

142. See Peter Nicholas, *Romney and Birth Control, A Shift*, WALL ST. J., Feb. 13, 2012, at A4.

In response to the pushback, the Obama Administration issued an “accommodation” on February 10, 2012, under which religiously affiliated groups would not have to pay for contraception coverage themselves; rather, women could contract directly with their insurance companies for free coverage.<sup>143</sup> The religious right remained unhappy with this compromise.<sup>144</sup>

On February 16, 2012, Rep. Darrell Issa, Chairman of the House Oversight Committee, convened a hearing about the rule, demanding that the government exclude employers from providing insurance coverage for any procedure they find morally objectionable.<sup>145</sup> The hearing was notable for its slate of all-male witnesses on the first panel, all of whom opposed the rule, and a picture of the witnesses seated in a row quickly went viral.<sup>146</sup> The hearing also gained notoriety because Rep. Issa barred Sandra Fluke, a Georgetown Law Student and member of Law Students for Reproductive Justice, from testifying about the need for contraception coverage at religiously-affiliated universities.<sup>147</sup> Democrats later scheduled their own, unofficial hearing, at which Fluke was the only witness.<sup>148</sup> There, Fluke testified that contraception coverage is not only expensive for students, constituting a financial hardship for forty percent of women, but also that women need contraception for a variety of health reasons in addition to birth control, such as treating ovarian cysts and endometriosis.<sup>149</sup>

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143. See OFFICE OF THE PRESS SECRETARY, THE WHITE HOUSE, FACT SHEET: WOMEN'S PREVENTIVE SERVICES AND RELIGIOUS INSTITUTIONS (Feb. 10, 2012), available at <http://www.whitehouse.gov/the-press-office/2012/02/10/fact-sheet-women-s-preventive-services-and-religious-institutions>.

144. See Laurie Goodstein, *Bishops Reject White House's New Plan on Contraception*, N.Y. TIMES (Feb. 11, 2012), <http://www.nytimes.com/2012/02/12/us/catholic-bishops-criticize-new-contraception-proposal.html>.

145. See Sarah Kliff, *Lawmakers Debate Contraception Mandate*, WASH. POST, Feb. 17, 2012, at A3 [hereinafter Kliff, *Lawmakers Debate*] (noting that several Democratic representatives walked out of the hearing).

146. See Ed O'Keefe, *Lawmakers End Quarrel Over Birth Control Hearing—Sort Of*, WASH. POST, Mar. 28, 2012, at A17; Elizabeth Flock, *Birth Control Hearing on Capitol Hill Had Mostly Male Panel of Witnesses*, WASH. POST (Feb. 16, 2012), [http://www.washingtonpost.com/blogs/blogpost/post/birth-control-hearing-on-capitol-hill-had-all-male-panel-of-witnesses/2012/02/16/gIQA6BM5HR\\_blog.html](http://www.washingtonpost.com/blogs/blogpost/post/birth-control-hearing-on-capitol-hill-had-all-male-panel-of-witnesses/2012/02/16/gIQA6BM5HR_blog.html).

147. See Kliff, *Lawmakers Debate*, *supra* note 145.

148. See Jim Abrams, *Sandra Fluke, Witness Snubbed by GOP, Speaks to Democrats About Birth Control*, HUFF. POST (Feb. 23, 2012, 1:58 PM), [http://www.huffingtonpost.com/2012/02/23/sandra-fluke-birth-control-democrats\\_n\\_1297110.html](http://www.huffingtonpost.com/2012/02/23/sandra-fluke-birth-control-democrats_n_1297110.html).

149. *Id.*; see also Jenna Johnson, *Student Expected Criticism, Not Attacks*, WASH. POST, Mar. 4, 2012, at C1 (describing Fluke's testimony).

This was apparently too much for Rush Limbaugh, who on February 29, 2012, began a three-day rant on his radio show falsely claiming that Fluke was seeking taxpayer money to have sex.<sup>150</sup> Among other things, he called her a “slut” and a “prostitute,” who “wants to be paid for having sex;” he also said she was “having so much sex, it’s amazing she can still walk.”<sup>151</sup> Public condemnation was swift, and his advertisers pulled out in droves.<sup>152</sup> At Georgetown, the University President supported Fluke’s right to free expression, and President Obama personally called Fluke to express his support for her and her message.<sup>153</sup> Sandra Fluke went on to speak about the issue at the Democratic National Convention.<sup>154</sup> Rush Limbaugh remains on the air.

While public polls during the height of the controversy revealed majority support for contraception coverage, with almost equal backing among men and women, polls also showed that voters were frustrated that the issue was on the agenda in a time of economic distress.<sup>155</sup> Meanwhile, a Republican attempt in Congress to legislatively overturn the contraception coverage rule failed.<sup>156</sup> Numerous lawsuits brought by states and religious groups challenging the rule are pending,<sup>157</sup> and the courts are splitting as to the rule’s constitutionality.<sup>158</sup> Thus, despite public

150. See Brian Stelter, *Facing Outcry, Limbaugh Apologizes for Attacking Student over Birth Control*, N.Y. TIMES, Mar. 4, 2012, at A18.

151. *Id.*

152. See Paul Fahri, *Advertisers Desert Limbaugh*, WASH. POST, Mar. 6, 2012, at C2.

153. See David Nakamura & Paul Kane, *President Calls Student Blasted by Rush Limbaugh*, WASH. POST, Mar. 3, 2012, at A1.

154. See Robin Abcarain, *In Town Called Charlotte, It’s a Woman’s World: High Profile Reflects Clout of Voting Bloc*, BALT. SUN, Sept. 7, 2012, at A10; Elyse Siegel, *Sandra Fluke Speech Text: Read the Democratic National Convention Remarks*, HUFF. POST (Sept. 5, 2012), [http://www.huffingtonpost.com/2012/09/05/sandra-fluke-speech-text-\\_n\\_1852635.html](http://www.huffingtonpost.com/2012/09/05/sandra-fluke-speech-text-_n_1852635.html).

155. Erik Eckholm, *Poll Finds Wide Support for Birth Control Coverage*, N.Y. TIMES, Mar. 1, 2012, at A15. A pre-election poll further showed that one-third of women voters considered the issue “extremely important” in determining how they planned to vote. Sam Baker, *Poll: Female Voters Give Obama Edge on Contraception, Abortion*, THE HILL (Oct. 15, 2012, 8:10 PM), <http://thehill.com/blogs/healthwatch/politics-elections/262125-poll-female-voters-give-obama-big-edge-on-contraception-abortion>.

156. Robert Pear, *Senate Rejects Step Targeting Coverage of Contraception*, N.Y. TIMES, Mar. 1, 2012, at A1.

157. See N.C. Aizenman, *Next Fights over Birth Control May Be in Courtrooms*, WASH. POST, Mar. 8, 2012, at A3; Laurie Goodstein, *Bishops Sue over Contraception Mandate*, N.Y. TIMES, May 22, 2012, at A17; Louise Radnofsky, *Seven States File Lawsuit over Contraception Rule*, WALL ST. J., Feb. 24, 2012, at A4.

158. Kathryn Smith, *Obamacare’s Many Contraception Lawsuits*, POLITICO (Nov. 28, 2012, 4:39 AM), <http://www.politico.com/news/stories/1112/84302.html>. For a thorough explanation



irritation that contraception coverage is being debated at all, the issue will be lingering for years to come. This is one of many fronts in the War on Women that remains ongoing, and it highlights the importance of having women in positions of power on Capitol Hill. Women legislators will not necessarily support contraception coverage, but their very presence will temper the debates and discussion by providing a range of perspectives from people who are directly impacted by these sorts of laws.

### B. Women Voters

Most women participate in politics in their role as voters. Feminist theorists have doubted whether voting adequately expresses the interests of women; “voting once every [few] years hardly counts as a substantial expression of popular control . . . [;] choosing between alternatives that may vary only in detail does not give citizens much of a choice . . . [;] choosing between vaguely expressed and all too frequently abandoned programmes leaves the decisions to the political elites.”<sup>159</sup> In some ways, civic society may provide a better outlet for women seeking to shape their communities.<sup>160</sup> Yet while voting alone does not ensure gender equality in representation or policy outcomes, the 2012 election reinforced a distinct gender gap in which women’s votes made the difference. This growing gap, and the reasons that underlie it, reveal that gender is still a unifying identity for women.

In the 2012 presidential election, women made up fifty-three percent of the electorate.<sup>161</sup> The gender gap was twenty points, the largest in American history.<sup>162</sup> Fifty-five percent of women voted

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as to why the contraception mandate is legal, see Caroline Mala Corbin, *The Contraception Mandate*, 107 NW. U. L. REV. 1469 (2013).

159. Phillips, *supra* note 5, at 76.

160. See Anne Phillips, *Who Needs Civil Society? A Feminist Perspective*, 46 DISSENT 56, 56–58 (1999); cf. Alison M. Jaggar, *Arenas of Citizenship: Civil Society, State, and the Global Order*, 7 INT’L FEMINIST J. OF POL. 3, 10 (2005) (“I also worry that undue emphasis on activism in civil society may sometimes restrict rather than expand women’s empowerment as citizens.”).

161. Margie Omero & Tara MacGuinness, *How Women Changed the Outcome of the Election*, CENTER FOR AM. PROGRESS (Dec. 12, 2012), <http://www.americanprogress.org/issues/women/report/2012/12/12/47916/how-women-changed-the-outcome-of-the-election/>; see also Lynn Sanders, Carah Ong & Adam Hughes, *What’s Up with White Women in 2012? Nothing New!*, U. OF VIRGINIA MILLER CENTER (Nov. 14, 2012), <http://millercenter.org/blog/whats-up-with-white-women-in-2012> (stating that in 1972, women were forty-nine percent of the electorate.).

162. Jonathan Easley, *Gallup: 2012 Election Had the Largest Gender Gap in Recorded History*, THE HILL (Nov. 9, 2012, 7:17 PM), <http://thehill.com/blogs/blog-briefing-room/news/267101-gallup-2012-election-had-the-largest-gender-gap-in-history>.

for Obama while forty-three percent voted for Romney.<sup>163</sup> Romney bested Obama among men by eight points, while women preferred Obama by twelve points.<sup>164</sup> Women who voted for Obama constituted almost one-third of the electorate.<sup>165</sup> Obama did better with divorced, single, and widowed women (a two to one margin over Romney), than with married women, who preferred Romney, fifty-three percent to forty-six percent.<sup>166</sup> Obama also did better with women of color,<sup>167</sup> while White women preferred Romney.<sup>168</sup> Obama's diverse coalition of support reinforces the importance of inclusivity within the feminist movement.

Polls also showed that women voters prioritized issues differently than men. Women generally prefer a more activist role for government than men do, and this preference has driven the gender gap at least since 1980, when men have moved toward the Republican Party and stayed there.<sup>169</sup> Specific issues may also have an impact on the gender gap, although political scientists still need to untangle the dynamics of the 2012 race. In 2012, a Pew poll before the election showed that fifty-four percent of women stated that abortion is a "very important" issue for them, compared with thirty-four percent of men.<sup>170</sup> While Republicans consistently stated that the economy was the most important issue

163. *Id.*; Omero & MacGuinness, *supra* note 161.

164. Easley, *supra* note 162.

165. Omero & MacGuinness, *supra* note 161.

166. Patt Morrison, *The Gender Gap and the GOP's Future*, L.A. TIMES (Nov. 7, 2012), <http://articles.latimes.com/2012/nov/07/news/la-ol-gender-gap-and-the-gops-future-20121107>.

167. "Obama won the majority among these voters, including [ninety-six] percent of black women, [seventy-six] percent of Hispanic women and [sixty-six] percent of women of other races, including Asians. Obama also did well among single women of all races, garnering [sixty-seven] percent." Sanders, Ong & Hughes, *supra* note 161.

168. John Cassidy, *What's Up With White Women? They Voted for Romney, Too*, NEW YORKER (Nov. 9, 2012), <http://www.newyorker.com/online/blogs/johncassidy/2012/11/why-white-women-voted-for-romney.html>. White women are thirty-eight percent of the electorate. *Id.*

169. See Ronald Inglehart & Pippa Norris, *The Developmental Theory of the Gender Gap: Women's and Men's Voting Behavior in Global Perspective*, 21 INT'L POL. SCI. REV., 441, 441-42 (2000) (describing the pattern of gender realignment in the United States since 1980); see also Sanders, Ong & Hughes, *supra* note 161; Libby Copeland, *Why Do Women Vote Differently Than Men?*, SLATE (Jan. 4, 2012), [http://www.slate.com/articles/double\\_x/doublex/2012/01/the\\_gender\\_gap\\_in\\_politics\\_why\\_do\\_women\\_vote\\_differently\\_than\\_men\\_.html](http://www.slate.com/articles/double_x/doublex/2012/01/the_gender_gap_in_politics_why_do_women_vote_differently_than_men_.html); *Blame Mars, Not Venus*, THE ECONOMIST, Oct. 2, 2012, 2:11 PM) <http://www.economist.com/blogs/democracyinamerica/2012/10/campaign-and-gender-gap>.

170. *The Complicated Politics of Abortion*, PEW RES. CENTER FOR PEOPLE & PRESS (Aug. 22, 2012), <http://www.people-press.org/2012/08/22/the-complicated-politics-of-abortion/>.

for women, a Gallup poll showed that thirty-nine percent of women listed abortion as the most important issue in the election as compared to nineteen percent who listed jobs as the preeminent issue or sixteen percent who listed the economy.<sup>171</sup> It appears that the debates engendered by the War on Women shaped public opinion.

Republicans' attempts to mock the Democrats' framing of a War on Women by comparing it to a War on Caterpillars (the National Republican Party's Chairman Reince Preibus)<sup>172</sup> or a War on Left-Handed Irishmen (Republican Vice Presidential candidate Paul Ryan)<sup>173</sup> could not diminish the harm done to the Republican party by several socially conservative male candidates who made controversial comments about abortion and rape. While reasonable minds can certainly differ about abortion, especially given the deeply held religious beliefs implicated by the issue, the War on Women involved words and conduct that proved unreasonable to most voters regardless of personal philosophy.<sup>174</sup> For instance, Representative Todd Akin of Missouri was a long-time anti-abortion advocate who was expected to win a Senate seat in a race against incumbent Senator Claire McCaskill.<sup>175</sup> That was until he issued his infamous comment on August 19, 2012, in response to a question as to whether rape victims should have the option of abortion.<sup>176</sup> He stated, "first of all, from what I understand from doctors, that's really rare. If it's a legitimate rape, the female body has ways to try to shut that whole thing down."<sup>177</sup> Akin may have been a member of the House Science

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171. Andrew Dugan, *Women in Swing States Have Gender-Specific Priorities*, GALLUP (Oct. 17, 2012), <http://www.gallup.com/poll/158069/women-swing-states-gender-specific-priorities.aspx>.

172. Karen Tumulty & David Nakamura, A "War on Women" or Battle for Their Vote?, WASH. POST, Apr. 6, 2012, at A1.

173. Felicia Sonmez, *At Fla. Fundraiser, Paul Ryan Mocks "War on Women,"* WASH. POST. (Oct. 18, 2012), <http://www.washingtonpost.com/blogs/post-politics/wp/2012/10/18/at-fla-fundraiser-paul-ryan-mocks-war-on-women/>.

174. "In the two U.S. Senate races where Republican candidates made controversial comments about rape, women's votes played important roles in the victories of the Democratic candidates." Press Release, Ctr. for Am. Women & Politics, *Women's Votes Critical to Democrats Retaining Control of the U.S. Senate* (Nov. 9, 2012), available at [http://www.cawp.rutgers.edu/press\\_room/news/documents/PressRelease\\_11-09-12-ggap-senate.pdf](http://www.cawp.rutgers.edu/press_room/news/documents/PressRelease_11-09-12-ggap-senate.pdf).

175. See Naftali Bendavid & Louise Radnofsky, *Crucial Senate Race in Uproar—Republicans Press Missouri Nominee Akin to Drop out After Comments on Rape*, WALL ST. J., Aug. 21, 2012, at A1.

176. *Id.*; Lori Moore, *Rep. Todd Akin: The Statement and the Reaction*, N.Y. TIMES, Aug. 20, 2012, at A13.

177. Bendavid & Radnofsky, *supra* note 175.

Committee, but his understanding of how rape shuts down the female body has no support whatsoever in science.<sup>178</sup> Moreover, Akin's framing of "legitimate rape" suggested not only that rape victims who get pregnant are lying about their attack, but also that some sorts of rape are more worthy of condemnation than others.<sup>179</sup> As one commentator asked, "[w]hat is illegitimate rape?"<sup>180</sup>

Akin's comments generated a torrent of criticism,<sup>181</sup> and the timing for Republicans could not have been worse, as they were made a week before the Republican National Convention.<sup>182</sup> Mitt Romney called Akin's remarks "inexcusable, insulting, and frankly, wrong."<sup>183</sup> Despite Romney's distancing move, his vice presidential pick, Congressman Paul Ryan, had previously co-sponsored with Akin the No Taxpayer Funding for Abortion Act in 2011, which would have required a woman to prove she was "forcibly raped" in order to use Medicaid funds for an abortion.<sup>184</sup> By contrast, President Obama stated, "[r]ape is rape, and the idea that we should be parsing and qualifying and slicing what types of rape we're talking about doesn't make sense to the American people and certainly doesn't make sense to me."<sup>185</sup> Many prominent Republican politicians and commentators begged Akin to back out of the race, but he refused to step aside.<sup>186</sup> He lost to McCaskill by over fourteen points.<sup>187</sup>

178. *See id.*

179. Amy Davidson, *What Does Todd Akin Think "Legitimate Rape" Is?*, NEW YORKER (Aug. 19, 2012), <http://www.newyorker.com/online/blogs/closeread/2012/08/what-does-todd-akin-think-legitimate-rape-is.html>,

180. *Id.*

181. Bendavid & Radnofsky, *supra* note 175.

182. Dana Milbank, *Paul Ryan's Legitimate Problem*, WASH. POST, Aug. 23, 2012, at A2.

183. *Id.*

184. Mitchell Landsberg, *Paul Ryan Seeks to Smooth over Differences with Romney on Abortion*, L.A. TIMES (Aug. 22, 2012), <http://articles.latimes.com/2012/aug/22/news/la-pn-paul-ryan-romney-abortion-differences-20120822>; Milbank, *supra* note 182.

185. Moore, *supra* note 176.

186. *See* Aaron Blake, *Looks Like Akin Isn't Bowing out*, WASH. POST, Sept. 21, 2012, at A4. The Republican Senatorial Campaign said publicly that it would cut off funding to Akin, but secretly pumped \$760,000 into his campaign in its final days. *See* Dierdre Shesgreen, *Republicans Gave \$760K to Akin Campaign Despite Disavowal*, USA TODAY (Dec. 7, 2012), <http://www.usatoday.com/story/news/politics/2012/12/06/akin-republicans-missouri-politics/1752725/>.

187. Greg Jaffe, *GOP's Akin, Mourdock Lose in Wake of Remarks*, WASH. POST, Nov. 7, 2012, at A30; Diana Reese, *Claire McCaskill Legitimately Shuts down Todd Akin in Missouri Senate Race*, WASH.

Two months later, in October 2012, a similar controversy arose when Richard Mourdock, the Republican Senate candidate in Indiana and presumed frontrunner of the race, stated during a candidate debate that “even when life begins in that horrible situation of rape, it is something that God intended to happen.”<sup>188</sup> He lost.<sup>189</sup> Other Republican candidates made similarly controversial comments about rape and paid the price at the polls. John Koster, the Republican candidate for a congressional seat from Washington State stated that he opposes legal abortion in cases of “the rape thing” because an abortion would only serve to “put[] more violence on a woman’s body.”<sup>190</sup> He lost.<sup>191</sup> Tom Smith, a Republican candidate for Senate from Pennsylvania, compared a rape victim who gets pregnant to a family member who had a child out of wedlock and said that both situations have a “similar” effect on their fathers.<sup>192</sup> He lost.<sup>193</sup> There are even more examples of offensive Republican comments about rape and pregnancy from the 2012 election cycle.<sup>194</sup> In each case, voters rejected these comments. Overall, women’s votes determined the outcome in all of the senatorial elections won by Democratic candidates, and

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POST (Nov. 7, 2012), <http://www.washingtonpost.com/blogs/she-the-people/wp/2012/11/07/claire-mccaskill-legitimately-shuts-down-todd-akin-in-missouri-senate-race/>.

188. Karen Tumulty, *Mourdock Brings Social Issues to Fore Again*, WASH. POST, Oct. 25, 2012, at A5. While Mitt Romney issued a statement disagreeing with Mourdock’s comments, he continued to support his campaign. See Jonathan Weisman, *Rape Remark Jolts a Senate Race, and the Presidential One, Too*, N.Y. TIMES, Oct. 25, 2012, at A16.

189. See Jaffe, *supra* note 187.

190. Brad Bannon, *Republican Rape Rants Will Ruin Party’s Election Chances*, U.S. NEWS & WORLD REP. (Nov. 1, 2012), <http://www.usnews.com/opinion/blogs/brad-bannon/2012/11/01/republican-rants-on-rape-will-ruin-the-partys-election-chances>; Lynne Varner, *Republican Candidate John Koster and the “Rape Thing,”* SEATTLE TIMES (Nov. 1, 2012), [http://seattletimes.com/html/edcetera/2019582924\\_republican\\_candidate\\_john\\_kost.html](http://seattletimes.com/html/edcetera/2019582924_republican_candidate_john_kost.html).

191. Emily Heffter, *DelBene Beats Koster in Race for U.S. House Dems Hold State’s Most Competitive District*, SEATTLE TIMES (Nov. 6, 2012), [http://seattletimes.com/html/politics/2019621624\\_elex1stcongdistrict07m.html](http://seattletimes.com/html/politics/2019621624_elex1stcongdistrict07m.html).

192. Irin Carmon, *Tom Smith: Meet the New Todd Akin*, SALON (Aug. 27, 2012), [http://www.salon.com/2012/08/27/tom\\_smith\\_meet\\_the\\_new\\_todd\\_akin/](http://www.salon.com/2012/08/27/tom_smith_meet_the_new_todd_akin/).

193. See Joshua Green, *Obama Wins, Big Time*, BLOOMBERG BUSINESSWEEK, Pol. & Pol’y (Nov. 6, 2012), <http://www.businessweek.com/articles/2012-11-06/obama-wins-big-time>.

194. See online compilations at Lindsay Cross, *Whether the “War on Women” Was Real or Not, Female Voters Struck Down Ignorance on Election Day*, MOMMYISH (Nov. 7, 2012, 8:59 AM), <http://www.mommyish.com/2012/11/07/election-results-akin-mourdock-war-on-women-338>; Tara Culp-Ressler, *Rape Comments Cost Anti-Choice Candidates Their Seats*, THINKPROGRESS (Nov. 7, 2012, 10:10 AM), <http://thinkprogress.org/health/2012/11/07/1155211/rape-gaffes-lose-elections/>.

Democrats retained control of the Senate.<sup>195</sup> With Republicans in charge of the House of Representatives, battles over issues impacting women are likely to continue. Indeed, in the first days of the 113th Congress, Congress failed to reauthorize the Violence Against Women Act, which provides federal funding to reduce domestic violence, due to Republican opposition to some expanded protections.<sup>196</sup> The bill ultimately passed when the Republican House leadership allowed a vote on the Senate version of the bill.<sup>197</sup>

## Conclusion

In the 2012 election cycle, the feminist movement in the United States was rejuvenated in response to a social conservative offensive aimed mostly at women's reproductive rights. Around the country, organized women's advocacy groups joined with grassroots activists to fight assaults on women's equality and autonomy, such as proposals that would grant fetuses personhood status, require transvaginal ultrasounds for women seeking abortions, and limit employer-provided insurance coverage for contraception. This so-called War on Women embroiled the presidential candidates as they campaigned aggressively for women's votes, which proved decisive to President Obama's win. Throughout the War on Women, social media became integral in disseminating information, expressing outrage, and organizing activism. Not only did feminism bolster the democratic process by enhancing debate and citizen involvement, but democracy proved a fertile ground for expanding the very notion of "women's issues" as people realized that issues such as equal pay and reproductive rights impact the well-being of families and the country as a whole. The War on Women also highlights the centrality of women's dignity and autonomy to a functioning democracy. In other words, without opportunities to work and equal pay, access to reproductive health services, and freedom from abuse, women are denied the prerogatives of citizenship that make full political participation and voting possible. Thus, any War on Women is a War on Democracy. The fates of feminism and democracy are linked.

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195. Press Release, *supra* note 174.

196. The 113th Congress did not reauthorize the Violence Against Women Act until Feb. 12, 2013. See Rosalind S. Helderman, *Votes to Reauthorize Violence Against Women Act*, WASH. POST (Feb. 12, 2013), [http://articles.washingtonpost.com/2013-02-12/politics/37054316\\_1\\_violence-against-women-act-domestic-violence-senate-vote](http://articles.washingtonpost.com/2013-02-12/politics/37054316_1_violence-against-women-act-domestic-violence-senate-vote); see also Ashley Parker, *House Renews Violence Against Women Measure*, N.Y. TIMES, Feb. 28, 2013, at A13.

197. *Id.*